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Lawlessness Breeds Lawlessness: A Case for Applying the Fourth Amendment to Extraterritorial Searches

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LAWLESSNESS BREEDS LAWLESSNESS: A CASE FOR
APPLYING THE FOURTH AMENDMENT TO
EXTRATERRITORIAL SEARCHES

*Amy E. Pope**

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INTRODUCTION

It is a priority of the United States to

[h]elp partner countries strengthen governance and transparency, break the corruptive power of transnational criminal networks, and sever state–crime alliances. The United States needs willing, reliable and capable partners to combat the corruption and instability generated by TOC [Transnational Organized Crime] and related threats to governance. We will help international partners develop the sustainable capacities necessary to defeat transnational threats; strengthen legitimate and effective public safety, security, and justice institutions; and promote universal values. We will also seek to sever the powerful strategic alliances that form between TOC and states, including those between TOC networks and foreign intelligence services.¹

This official statement of the U.S. government’s strategy toward transnational organized crime recognizes a developing phenomenon: the maturation of criminal networks that increasingly know no boundaries. From narcotics trafficking to money laundering to human smuggling and cybercrime, increasingly sophisticated criminal organizations transcend national frontiers effortlessly, destabilize business and state infrastructures, and leave countless victims in their wake.

If nation–states are to keep pace with criminal networks, they must transcend their own frontiers. The more individual nations—particularly smaller countries in the immediate path of these criminal networks—are boxed in by fixed notions of sovereignty, the more they stand to lose. Sophisticated criminals do not hesitate to cross boundaries, build transborder alliances, or nimbly change their patterns in response to law enforcement efforts. If nations cannot keep up, the criminal networks will (and do) run circles around them.

1. WHITE HOUSE, STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME: ADDRESSING CONVERGING THREATS TO NATIONAL SECURITY 13 (July 19, 2011), <http://www.whitehouse.gov/sites/default/files/microsites/2011-strategy-combat-transnational-organized-crime.pdf>.

In recognition of this dynamic, U.S. federal law increasingly blurs the boundaries between criminal conduct committed in the territorial United States and conduct committed abroad that impacts the United States. Increasingly, foreign nationals are held to account for violations of U.S. federal laws “for conduct committed entirely beyond the territorial limits of the United States that nevertheless has effects in this country.”² As Justice William Brennan recognized over twenty years ago, “[f]oreign nationals must now take care not to violate our drug laws, our antitrust laws, our securities laws, and a host of other federal criminal statutes.”³ The number of statutes with extraterritorial jurisdiction continues to increase as Congress tries to bridge the gap between criminal conduct committed abroad and the disastrous effects felt within the United States.⁴

2. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 279–80 (1990) (Brennan, J., dissenting).

3. *Id.* at 280 (footnotes omitted).

4. See Ethan A. Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 HARV. INT’L L.J. 37, 37–38 (1990) (“Each year new laws are enacted and old ones amended to expand the United States government’s ability to police crimes such as drug trafficking, high tech smuggling, and terrorist activity.”). A partial list of extraterritorial statutes is included here to provide some context for the breadth of conduct that can occur outside the United States yet still be punished inside the United States. *E.g.*, 18 U.S.C. § 351(i) (2006) (providing extraterritorial jurisdiction over congressional, Cabinet, and Supreme Court assassinations, kidnappings, and assaults); *id.* § 470 (providing extraterritorial jurisdiction over counterfeit acts); *id.* § 956 (providing extraterritorial jurisdiction over conspiracies to kill, kidnap, maim, or injure persons or damage property in a foreign country); *id.* § 1116(c) (providing extraterritorial jurisdiction over the murder or manslaughter of foreign officials, official guests, or internationally protected persons); *id.* § 1119 (providing extraterritorial jurisdiction over the foreign murder of a U.S. national by a U.S. national); *id.* § 1201 (providing extraterritorial jurisdiction over kidnapping in certain circumstances); *id.* § 1203 (providing extraterritorial jurisdiction over hostage taking); *id.* § 1204 (providing extraterritorial jurisdiction over the kidnapping of a minor by his or her parent); *id.* § 1512(h) (providing extraterritorial jurisdiction over tampering with a witness, victim, or informant); *id.* § 2261 (providing extraterritorial jurisdiction over domestic violence); *id.* § 2261A (providing extraterritorial jurisdiction over stalking); *id.* § 2422 (providing extraterritorial jurisdiction over coercion and enticement); *id.* § 3271 (providing extraterritorial jurisdiction over trafficking in persons committed by persons employed by or accompanying the federal government outside the United States). It should be noted however that the precise language in the preceding statutes may limit extraterritorial jurisdiction.

There are also a significant number of crimes that are applicable extraterritorially by inference irrespective of location. See, e.g., *id.* § 111 (criminalizing assault, resisting, or impeding certain officers or employees); *id.* § 495 (criminalizing forgery of written documents for the purpose of obtaining money from the U.S. Government); *id.* § 499 (criminalizing the forgery of U.S. military documents); *id.* § 112(e) (criminalizing certain crimes against foreign officials, official guests, and internationally protected persons); *id.* § 115 (criminalizing influencing, impeding, or retaliating against a federal official by threatening or injuring a family member); *id.* § 371 (criminalizing conspiracy to commit an offense against or defraud the U.S. government).

Likewise, the United States exercises jurisdiction over crimes committed in the Special Maritime and Territorial Jurisdiction (SMTJ)—a specific category of domestic and extraterritorial jurisdiction defined in 18 U.S.C. § 7 (2006). There are nine subcategories of SMTJ, each described in its own subsection. These are, in brief:

Despite the extraterritorial reach of U.S. statutes, the reach of U.S. law enforcement is not so long. In fact, U.S. law enforcement is, by and large, entirely dependent on foreign law enforcement partners to secure the evidence needed to prosecute cases in U.S. federal court. Because U.S. law enforcement agents are limited in their ability to act outside of the jurisdictional limits of the United States, partnering with foreign governments is the primary method by which U.S. law enforcement can meaningfully dismantle these criminal organizations.

-
- (1) The high seas . . . and any vessel belonging . . . to the United States or any citizen thereof, or to any corporation [thereof] . . . when such vessel is within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.
 - (2) Any [U.S.-registered or enrolled vessels] upon . . . the Great Lakes, or . . . the waters connecting them, or upon the Saint Lawrence River where the same constitutes the International Boundary Line.
 - (3) Any lands reserved or acquired for the use of the United States . . . for the erection of a fort, magazine, arsenal, dockyard, or other needful building.
 - (4) [Guano islands].
 - (5) Any aircraft belonging . . . to the United States, or any citizen thereof, or to any corporation [thereof] . . . while such aircraft is in flight over the high seas, or over any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.
 - (6) [U.S. registered space vehicles] from the moment when all external doors are closed on Earth
 - (7) Any place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.
 - (8) . . . any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a national of the United States.
 - (9) With respect to offenses committed by or against a national of the United States . . .
 - (A) the premises of United States diplomatic, consular, military or other United States Government missions or entities in foreign States, including the buildings, parts of buildings, and land appurtenant . . . thereto or used for purposes of those missions or entities, irrespective of ownership; and
 - (B) residences in foreign States and the land appurtenant . . . thereto, irrespective of ownership, used for purposes of those missions or entities or used by United States personnel assigned to those missions or entities.

Id. § 7.

Unlike other extraterritorial statutes and the Military Extraterritorial Jurisdiction Act, SMTJ applies only if the substantive statute expressly states that it applies within the SMTJ. Such statutes include 18 U.S.C. § 113 (2006) (assault), 18 U.S.C. § 114 (maiming), 18 U.S.C. § 661 (theft), 18 U.S.C. §§ 1111–1113 (homicide and attempted homicide), 18 U.S.C. § 1201 (kidnapping), 18 U.S.C. § 1363 (property damage), and 18 U.S.C. §§ 2241–2244 (sexual abuse). Special thanks are given to the Human Rights and Special Prosecutions Section of the Criminal Division of the Department of Justice for providing guidance on this list. A more complete list of crimes with extraterritorial jurisdiction can be found at CHARLES DOYLE, CONG. RESEARCH SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 40–63 (2012).

The ways in which U.S. law enforcement agencies form these partnerships are significant. U.S. government actors increasingly share information with foreign partners. Foreign partners also work in U.S. intelligence and law enforcement centers. Moreover, U.S. government agents are physically on the ground working hand in hand with foreign law enforcement—either in an advisory- or capacity-building role; in some cases, U.S. government actors are cross-designated to perform law enforcement functions in foreign government jurisdictions.

Law enforcement agents of many nations welcome the exciting possibilities for cross-border cooperation. But these partnerships raise a host of legal and policy concerns that we cannot ignore, particularly as it relates to the collection of evidence and information on which a case is built.

The purpose of this Article is to revisit the jurisprudence on the Fourth Amendment's application to extraterritorial searches in which the fruits of seizures are introduced in U.S. courts to prosecute defendants who violate U.S. federal statutes. The Supreme Court has not opined on this issue since 1990,⁵ and the time for review is ripe.

This Article suggests that as our criminal laws and powers of enforcement continue to stretch, so, too, should the Fourth Amendment to include any defendant tried in a U.S. court for violating U.S. law. This idea goes beyond the conclusions drawn by courts and scholars who considered the issue before, and focuses not on the source of the evidence or on the characteristics of the defendant, but on how the evidence is used, particularly how it may be used to extend the reach of the law enforcement arm of the United States.⁶ To get there, this Article first reviews the development of the Fourth Amendment as it is applied to partnerships between federal and state law enforcement. It then revisits the Supreme

5. See *Verdugo-Urquidez*, 494 U.S. 259.

6. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 654 (1961) (citing *Elkins v. United States*, 364 U.S. 206, 223 (1960)) (noting that “all evidence obtained by an unconstitutional search and seizure [is] inadmissible in a federal court regardless of its source”); Kif Augustine Adams, Recent Development, *Foreigners, Foreign Property, and the Fourth Amendment: United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990), 13 HARV. J.L. & PUB. POL’Y 1037, 1040 (1990) (analyzing what constitutes a “substantial connection” sufficient to establish Fourth Amendment protections); Eric Bentley, Jr., *Toward an International Fourth Amendment: Rethinking Searches and Seizures Abroad After Verdugo-Urquidez*, 27 VAND. J. TRANSNAT’L L. 329, 334 (1994) (suggesting two alternative transnational approaches for determining the “reasonableness” of extraterritorial searches); Randall K. Miller, *The Limits of U.S. International Law Enforcement After Verdugo-Urquidez: Resurrecting Rochin*, 58 U. PITT. L. REV. 867, 883 (1997) (suggesting that the constitutional protections cannot apply to someone who is involuntarily brought to the United States to face trial); Irvin B. Nathan & Christopher D. Man, *Coordinated Criminal Investigations Between the United States and Foreign Governments and Their Implications for American Constitutional Rights*, 42 VA. J. INT’L L. 821, 823 (2002) (advocating for broader understanding of a joint venture analysis, but without taking on the question of who is protected from an unreasonable search).

Court's 1990 conclusion in *United States v. Verdugo-Urquidez*,⁷ and questions whether its premise—that the Fourth Amendment does not apply to a foreign national defendant who is not a legal permanent resident or otherwise “substantially” connected to the United States—still holds in light of the evolution of crime and law enforcement methods. It rejects analysis that the Fourth Amendment applies only at the time of the search itself,⁸ as opposed to any further use by the government to deprive individuals of their liberty, and embraces a similar assessment conducted by the Supreme Court as federal and state law enforcement partnerships deepened in response to increasingly multi-jurisdictional crimes in the 1940s.⁹ Ultimately, this Article suggests that we should recommit to the case law from the mid-twentieth century in which the Court concluded that ensuring respect for the Fourth Amendment protection of privacy was so basic to our free society that it is protected by the Due Process Clause of the Constitution.

The impact of this approach is to teach by doing: to raise the standards of foreign partners where there is inconsistent respect for human rights and civil liberties, and to significantly diminish the likelihood that U.S. law enforcement will operate with unclean hands or benefit from the questionable practices of foreign law enforcement. Ultimately, this approach will promote the greatest respect for human rights and civil liberties in the United States and abroad.

I. JOINT VENTURES

A. Application of “Joint Venture” Analysis in Federal–State Partnerships

In general, the Fourth Amendment, which guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” prohibits the government from exercising the authority to search a private individual’s person or home without first obtaining a warrant from a neutral magistrate, except in certain limited circumstances.¹⁰ Since 1886, the federal courts considered

7. 494 U.S. 259.

8. See, e.g., Mark A. Godsey, *The New Frontier of Constitutional Confession Law—The International Arena: Exploring the Admissibility of Confessions Taken by U.S. Investigators from Non-Americans Abroad*, 91 GEO. L.J. 851, 874, 880 (2003).

9. See generally Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT’L L. 444 (1990) (contending that U.S. law enforcement should be similarly restrained when law enforcement officials act abroad as they are when they act domestically, but declining to address whether courts should similarly exclude evidence obtained unreasonably).

10. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants

exclusion of evidence as a remedy to an unreasonable search and seizure by federal agents.¹¹ In 1914, in *Weeks v. United States*,¹² the Court articulated that, because the “effect of the Fourth Amendment” is to “limit[]” and “restrain[]” federal actors “as to the exercise of such power and authority,”¹³ exclusion is the “only viable remedy available for Fourth Amendment violations.”¹⁴

Despite its recognition that the Fourth Amendment could not be effectuated without the remedy of exclusion, the impact of the Court’s decisions was limited by its holding that the Fourth Amendment did not apply to the states.¹⁵ As a result, evidence that would have been found unreasonably obtained and excluded if seized by federal officers, was not excluded if state actors gathered it—even when used in a federal prosecution.¹⁶ Courts recognized the undesirable behavior this position potentially fostered and tried to devise a formula that removed the incentive for federal law enforcement officers to shift duties for gathering evidence to state officers. In so doing, courts created the concept of the “joint venture.”¹⁷ If the federal and state law enforcement actors were engaged in a joint venture, then the Fourth Amendment would apply to evidence introduced in a U.S. federal court.¹⁸ The operative question for federal judges in analyzing state–federal partnerships during this time was what motivated the officer’s actions. If the state officer acted to enforce

shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

11. *Boyd v. United States*, 116 U.S. 616, 638 (1886), *abrogated on other grounds by* *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967); *see also* Mark E. Cammack, *The Rise and Fall of the Constitutional Exclusionary Rule in the United States*, 58 AM. J. COMP. L. SUPP. 631, 649 (2010) (noting that exclusion of involuntary confessions dates back to the common law of evidence); Tom Quigley, *Do Silver Platters Have a Place in State-Federal Relations? Using Illegally Obtained Evidence in Criminal Prosecutions*, 20 ARIZ. ST. L.J. 285, 285 (1988).

12. 232 U.S. 383 (1914), *overruled by* *Elkins v. United States*, 364 U.S. 206 (1960), and *Mapp v. Ohio*, 367 U.S. 643 (1961).

13. *Id.* at 391–92.

14. Andrew E. Taslitz, *Hypocrisy, Corruption, and Illegitimacy: Why Judicial Integrity Justifies the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 419, 423 (2013); *see also* *Weeks*, 232 U.S. at 393 (“If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.”).

15. *Weeks*, 232 U.S. at 398 (holding that the Fourth Amendment is not directed at the conduct of local police officers).

16. *See, e.g., Byars v. United States*, 273 U.S. 28, 33 (1927), *abrogated by* *Elkins v. United States*, 364 U.S. 206 (1960).

17. *Id.*

18. *Id.*

state laws, then there was no joint venture, just a happy coincidence. But,

where the federal officers adopt a prosecution originated by state officers as the result of a search made by them, the same rule as to the admissibility of evidence obtained in the course of the search should be applied as if it were made by the federal officers themselves or under their direction.¹⁹

Under such circumstances, if “the federal authorities use the evidence in a federal prosecution, they become subject to all the limitations of the Federal Constitution, regardless of whether state prosecutors might be similarly limited by the State Constitution.”²⁰

It was not until *Wolf v. Colorado*,²¹ in 1949, that the Court extended the reach of the Fourth Amendment to the states through the Due Process Clause of the Fourteenth Amendment.²² There, the Court recognized that “[t]he security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society” and therefore “enforceable against the States through the Due Process Clause.”²³ “The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police” should be “condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.”²⁴ In so holding, the Court wiped away the distinction between federal and state law enforcement actors. The key issue was the impact of the government intrusion on the individual’s liberty and the most significant harm attached at the time the defendant was faced with the illegally seized evidence at trial.²⁵

Despite its recognition that state police action was not materially different in effect from federal police action, the Court found that the Due Process Clause did not similarly require states to adopt the exclusionary rule, noting that “the ways of enforcing such a basic right raise questions of a different order.”²⁶ Justice Frankfurter, writing for the majority, concluded that the states may have methods for enforcing Fourth Amendment protections that are sufficiently effective to satisfy the Due Process Clause.²⁷

Thus, whether to exclude the evidence because of a federal violation of

19. *Sutherland v. United States*, 92 F.2d 305, 307 (4th Cir. 1937).

20. *Marsh v. United States*, 29 F.2d 172, 173 (2d Cir. 1928) (citing *Gambino v. United States*, 275 U.S. 310 (1927)).

21. 338 U.S. 25 (1949), *overruled in part by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

22. *Id.* at 27–28.

23. *Id.*

24. *Id.*

25. *See id.* at 41–42 (Murphy, J., dissenting).

26. *Id.* at 28 (majority opinion).

27. *Id.* at 31.

the Fourth Amendment remained a question for the trial courts. Because courts continued to treat evidence gathered by state actors differently than evidence gathered by federal actors, this practice required courts to still examine the extent of the role played by the federal government in gathering evidence when admitting it.²⁸ Arguably, there would be some remedy if state actors violated the right to privacy and then sought to use the evidence in a U.S. federal court.²⁹ At the very least, courts expanded their view as to what constituted a joint venture. Justice Frankfurter coined a new phrase and summarized the joint venture doctrine: “[A] search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a *silver platter*.”³⁰

In *Elkins v. United States*,³¹ the Court finally put a stake through the heart of the “silver platter doctrine” by extending the exclusionary rule to evidence gathered by state as well as federal investigators.³² Recognizing the dissonance in its earlier positions—that exclusion was the only viable remedy to preserve the protections of the Fourth Amendment³³ but that the Due Process Clause did not compel its use by the states³⁴—the Court finally connected the dots. If government actors violate this basic right of security of one’s privacy against arbitrary intrusion, then government actors should not benefit from this violation and exclusion is the correct remedy.³⁵

Importantly, in reaching this conclusion, *Elkins* flipped the Fourth Amendment question on its head. Rather than look to the badge of the individual effecting the search, the *Elkins* Court attached the right to privacy more firmly to the victim: “To the victim it matters not whether his constitutional right has been invaded by a federal agent or by a state officer.”³⁶ As cited by the *Elkins* majority, past practice reflected a “basic incongruity” recognized by Justice (then-Judge) Cardozo, specifically that a federal prosecutor could not benefit from evidence collected through the trespass of a federal officer, but did “not have to be so scrupulous about

28. Much as they previously did under the joint venture doctrine.

29. See *Benanti v. United States*, 355 U.S. 96, 102 n.10 (1957) (“It has remained an open question in this Court whether evidence obtained solely by state agents in an illegal search may be admissible in federal court despite the Fourth Amendment.”).

30. *Lustig v. United States*, 338 U.S. 74, 78–79 (1949) (emphasis added); see also Quigley, *supra* note 11, at 286.

31. 364 U.S. 206 (1960).

32. *Id.* at 208, 223.

33. *Weeks v. United States*, 232 U.S. 383, 393 (1914), *overruled by Elkins v. United States*, 364 U.S. 206 (1960), and *Mapp v. Ohio*, 367 U.S. 643 (1961).

34. *Wolf v. Colorado*, 338 U.S. 25, 33 (1949).

35. See *Elkins*, 364 U.S. at 223.

36. *Id.* at 215.

evidence brought to him by others.”³⁷ Such an inconsistent approach did not align with the tenets enshrined in the Constitution.

Likewise important, in reaching its conclusion, *Elkins* recognized the significance of the *use* of the evidence in effectuating a violation of the Constitution and the role the state actor played beyond the initial seizure. The key issue was not at all limited to who *collected* the evidence, but rather to how the federal prosecutor could benefit from it³⁸ and how courts would exercise their supervisory power over the administration of justice when choosing whether to admit it.³⁹ The role played by each of these government actors featured in the Court’s determination of whether the right of the people to be secure against unreasonable searches and seizures had been violated.

B. Application of “Joint Venture” Analysis in Federal–Foreign Partnerships

The state of the law that governs the admission of evidence collected by foreign officers and used in U.S. federal court by U.S. federal prosecutors is analogous to the law predating *Elkins*. Courts generally find that the Fourth Amendment—and the right to be secure against unreasonable searches and seizures—does not apply outside the United States regardless of whether the person searched is a U.S. citizen.⁴⁰ As a result, evidence that courts would exclude if seized by federal officers does not offend the Constitution if foreign actors gather it—even when used in a federal prosecution.⁴¹ As U.S. law enforcement agents increasingly partner with foreign law enforcement agents, however, courts have resurrected the joint venture doctrine from its mid-twentieth century grave. Thus, much like the pre-*Elkins* days, if a U.S. government agent substantially participates in a foreign investigation or surveillance of a U.S. person, then the court may deem the action to be a joint venture between the two nations and will apply a Fourth Amendment reasonableness standard to any resulting searches of the U.S. person.⁴²

There are two key differences between application of the joint venture analysis in these situations as compared to the analysis applied pre-*Elkins* to federal–state investigations. First, if the court finds a joint venture, foreign law governs the question of whether the search is reasonable, rather than U.S. law.⁴³ If the government actor conducts the search in a manner

37. *People v. Defore*, 150 N.E. 585, 588 (N.Y. 1926).

38. *See Elkins*, 364 U.S. at 215 & n.7.

39. *Id.* at 216.

40. *See, e.g., United States v. Rose*, 570 F.2d 1358, 1361 (9th Cir. 1978).

41. *See, e.g., id.* at 1361–62.

42. *See, e.g., id.* at 1362; *United States v. Andreas*, No. 96 CR 762, 1998 WL 42261, at *2 (N.D. Ill. Jan. 30, 1998).

43. *United States v. Juda*, 46 F.3d 961, 968 (9th Cir. 1995); *United States v. Peterson*, 812

consistent with foreign law, a reviewing court will presume it to be reasonable.⁴⁴ Even where the search is inconsistent with foreign law, as long as U.S. agents reasonably relied on foreign officials' representations of foreign law, a court will uphold the search under the "good faith exception" to the exclusionary rule.⁴⁵

Second, unlike the federal-state partnerships of the early twentieth century, courts that examine evidence from federal-foreign law enforcement partnerships are far less likely to find a joint venture, and therefore never reach the reasonableness inquiry of the search and seizure at all.⁴⁶ Rather than asking whether the U.S. officer had a hand in the search, courts undergo a fact-intensive inquiry into whether the U.S. officer *directed* the actions of the foreign officer.⁴⁷ For example, the mere presence and observation of foreign law enforcement by U.S. agents at the time of the search, seizure, surveillance, or interrogation generally is not enough to trigger a joint venture inquiry, even if federal prosecutors later introduce the resulting evidence in a U.S. trial.⁴⁸ Likewise, providing money, information on targets, wiretapping equipment, and interpretation services, are usually insufficient to trigger a joint venture inquiry if U.S. agents merely hoped that the foreign government would take additional action but did not direct them to do so.⁴⁹ Similarly, benefiting from the

F.2d 486, 490 (9th Cir. 1986).

44. Whether it is appropriate to import the standards of the foreign country when determining the "reasonableness" of the search and seizure is a different subject to be explored another day.

45. *Peterson*, 812 F.2d at 491–92 (citing *United States v. Leon*, 468 U.S. 897 (1984)); see also *Juda*, 46 F.3d at 968 (finding that a DEA agent reasonably relied on representations by Australian officials that no warrant was required under Australian law to place transmitter on vessel in Australian port); Kristopher A. Nelson, Note, *Transnational Wiretaps and the Fourth Amendment*, 36 HASTINGS CONST. L.Q. 329, 345 (2009) (outlining a three-part inquiry: (1) substantial participation; (2) done in keeping with foreign law; and (3) based on a reasonable belief that the foreign search complied with the foreign country's law); Caitlin T. Street, Note, *Streaming the International Silver Platter Doctrine: Coordinating Transnational Law Enforcement in the Age of Global Terrorism and Technology*, 49 COLUM. J. TRANSNAT'L L. 411, 433–34 (2011) (same).

46. See Robert L. King, Note, *The International Silver Platter and the 'Shocks the Conscience' Test: U.S. Law Enforcement Overseas*, 67 WASH. U. L.Q. 489, 511 (1989) (arguing that "federal courts, without acknowledgment, are applying the fourth amendment [sic] only when the United States actually seizes evidence during a foreign search or when U.S. conduct makes the foreign seizure possible").

47. See *id.* at 494–505.

48. See *United States v. Marzano*, 537 F.2d 257, 270 (7th Cir. 1976) ("FBI agents were present with Superintendent Tricker at various times during his investigation and search, but there is no evidence that they took an active part in interrogating or searching the suspects or in selecting evidence to seize. Mere presence of federal officers is not sufficient to make the officers participants."), *abrogated on other grounds by* *Carter v. United States*, 530 U.S. 255 (2000).

49. See *United States v. Maturo*, 982 F.2d 57, 61 (2d Cir. 1992) (agreeing that there was no joint venture where "the DEA requested background information on the Turkish telephone numbers, with the hope that the [Turkish National Police] would wiretap the numbers" even though

information gleaned from an interview by foreign officers familiar with U.S. investigations is not sufficient to establish a joint venture, as long as the U.S. agents do not “actively participate” or direct the interview.⁵⁰

On the other hand, courts generally find a joint venture where there is evidence of a sustained and regular interaction between foreign and U.S. law enforcement and where there is evidence that the United States directed or participated in the search. For example, handling evidence, participating in the arrest or surveillance of defendants, *and* providing money or supplies triggered a joint venture in one case.⁵¹ This determination is undercut, however, if the U.S. court finds that the foreign government had its own reasons to conduct the investigation independent of U.S. direction or was already investigating the subject prior to U.S. involvement. That foreign law enforcement “might also have intended to help the United States” is not a sufficient reason to attribute foreign law enforcement conduct to U.S. agents.⁵² Because individual trial courts make case-by-case determinations of whether the conduct established a joint venture, it is difficult to glean any hard and fast rules from an analysis of the case law, much less frame it the way the silver platter doctrine intended.⁵³

DEA agents also helped to translate intercepted calls); *United States v. Trenary*, 473 F.2d 680, 681–82 (9th Cir. 1973) (agreeing that there was no joint venture where a U.S. customs officer acted solely as an interpreter upon the request of the Mexican police and did not identify himself as a U.S. government official); *cf. Kilday v. United States*, 481 F.2d 655 (5th Cir. 1973) (agreeing that a court should deny habeas corpus relief where a person from the American consulate acted solely as an interpreter during interrogation by Argentinian police).

50. *See United States v. Lopez-Imitola*, No. 03 Cr. 294, 2004 WL 2534153, at *6 (S.D.N.Y. Nov. 5, 2004) (holding there was no joint venture because U.S. agents did not “actively participate” in the interview and neither asked foreign authorities to question the defendant nor provided any questions to ask the defendant).

51. *See United States v. Emery*, 591 F.2d 1266, 1268 (9th Cir. 1978) (finding a joint venture where DEA agents alerted the Mexican police of the possible activity, coordinated surveillance, supplied the pilot for the plane, and gave the signal that instigated the arrest); *see also United States v. Barona*, 56 F.3d 1087, 1094 (9th Cir. 1995) (finding a joint venture where U.S. agents requested wiretaps, the information obtained was immediately forwarded to them, and interpretation was provided throughout the surveillance).

52. *Marzano*, 537 F.2d at 271.

53. Noticeably absent from this inquiry is whether the results of an unreasonable search led to action in a U.S. court and whether it was appropriate for a U.S. court or a U.S. jury to rely on evidence from a questionable provenance. In fact, in all of these cases cited, the evidence seized during the foreign investigations was shared with American authorities for use in U.S. investigations and prosecutions. In most of them, the foreign officers did not hand the U.S. federal officers information neatly packaged on a silver platter. U.S. law enforcement was involved in some form or fashion. And unless the court finds a joint venture or allegations of conscience-shocking behavior, U.S. district courts make no inquiry into the methods by which the evidence was gathered. *See United States v. Callaway*, 446 F.2d 753, 755 (3d Cir. 1971) (finding that where searches occurring in a foreign country were conducted by foreign law enforcement officials who were not acting in connection, or cooperation, with American law enforcement authorities, and where the actions of the foreign officials were not so outrageous as to shock the conscience of the

As seen in the days predating *Wolf* and *Elkins*, there are multiple problems with the current approach used to analyze extraterritorial searches: (1) the current approach is inconsistent and fails to provide sufficiently bright lines for law enforcement who want to protect their investigations; (2) the current approach is not sustainable as sovereign governments increasingly focus on common targets and as informal and formal networks of prosecutors and law enforcement continue to mature; and (3) the current approach risks that U.S. courts will turn a blind eye to behavior that undermines our foundational constitutional commitments to justice and fairness.

C. Condemned to Repeat the Past: Reasons to Rethink Our Current Understanding of “Joint Ventures”

1. Blurry Lines Result in Inconsistent Outcomes and Jeopardize Investigations

Because courts employ a case-by-case analysis to determine the existence of a joint venture, the result is a loose set of guidelines applied in different ways by different courts.⁵⁴ What complicates this highly fact-specific inquiry is that the Supreme Court has yet to address the issue in the context of federal–foreign partnerships.⁵⁵ In the absence of clear guidance, courts adopt a “much more stringent standard for finding the federalization of an international investigation” than the federalization of a state investigation.⁵⁶

court, the fact that the searches were not based on probable cause was of no consequence).

54. For example, providing interpretation services alone is probably not enough to create a joint venture, but one indicium thereof. See *Barona*, 56 F.3d at 1094 (reasoning that the provision of translation services is one of several factors that demonstrates the existence of a joint venture, especially where U.S. agents requested a wiretap); *Maturo*, 982 F.2d at 61; *Emery*, 591 F.2d at 1268 (finding a joint venture where “D.E.A. agents alerted the Mexican police of the possible activity, coordinated the surveillance at the . . . airport, supplied the pilot for the plane and gave the signal that instigated the arrest,” and distinguishing *Trenary*, 473 F.2d 680, “where the agent merely acted as an interpreter”); *Trenary*, 473 F.2d at 681–82 (“The arrest and detention in Mexico was not a joint venture; [the U.S. customs officer] was not acting as an American agent but *only* as an interpreter.” (emphasis added)).

55. The issue is further complicated “by the fact that some constitutional guarantees apply differently abroad than they do domestically.” Nathan & Man, *supra* note 6, at 822. The courts also apply a different analysis in cases involving the Fifth and Sixth Amendments than they do in the Fourth Amendment context. *Id.* at 823–24.

56. *Id.* at 832 (noting that the Supreme Court held that a “search is a search by a federal official if he had a hand in it” or where “federal agents had participated” (quoting *Lustig v. United States*, 338 U.S. 74, 76 (1949))). Nathan and Man argue that, because the lower courts have not articulated the same standard when examining a federal–foreign joint venture as the courts previously had when examining federal–state joint ventures, there is an inconsistency in the courts’ treatment of the issue. *Id.* at 832 & nn.43–44. This may be a stretch given that the Supreme Court articulated this “participation” test only in the context of federal–state joint ventures. The Supreme Court never took the opportunity to articulate whether the earlier joint venture doctrine extends

There are multiple dangers inherent in relying on this “I know it when I see it” approach, particularly in the area of criminal law. Foremost among these dangers is the uncertainty courts are unwittingly introducing into the ability of law enforcement to act effectively and efficiently. “A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed,” but are impractical for the officer in the field to apply.⁵⁷ The security that the Fourth Amendment was designed to protect “can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.”⁵⁸ Particularly given the “limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances [police officers] confront,” a single, familiar standard is essential.⁵⁹ By and large, law enforcement officers are more than willing and capable of operating within established guidelines. The key is that they know the scope of these guidelines. Given this preference for bright-line rules, the current joint venture analysis practically begs for reconsideration.

2. It Is Not Sustainable

The United States’ prior experience with the joint venture analyses is instructive. After thirty-five years of applying the doctrine, and as the number of federal–state partnerships increased, it became clear that this “bright-line rule” was neither very bright nor a true hard-and-fast rule. “That such a rule would engender practical difficulties in an era of expanding federal criminal jurisdiction could not, perhaps, have been foreseen.”⁶⁰ But there, as here with international investigations, the difficulties in parsing out which conduct violated the rule and which did not led to the familiar situation where “federal courts did not find themselves in complete harmony, nor even internally self-consistent.”⁶¹

We are well past the point articulated in *Elkins* with respect to U.S.–foreign investigations. In the past few years, the number of joint

fully to federal–foreign partnerships and, for a variety of reasons, courts treat federal–foreign partnerships as a different animal. That distinction is easily forgotten as courts otherwise import—but resist applying—much of the language from these early twentieth century federal–state cases when they look at federal–foreign partnerships; the courts are unable to complete the analogy. Nathan and Man argue that this resistance is a mistake. *Id.* at 834–36.

57. Wayne R. LaFave, “Case-By-Case Adjudication” Versus “Standardized Procedures”: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141, cited in *New York v. Belton*, 453 U.S. 454, 458 (1981).

58. *Id.* at 142.

59. *Dunaway v. New York*, 442 U.S. 200, 214 (1979).

60. *Elkins v. United States*, 364 U.S. 206, 211 (1960).

61. *Id.* at 212.

investigations only continued to expand. The United States has over sixty mutual legal assistance treaties in force.⁶² These bilateral agreements provide a formal mechanism for two countries to gather and exchange evidence and information to enforce public or criminal laws.⁶³ Likewise, growing numbers of federal civilian law enforcement agencies are assigning increasing numbers of personnel overseas, a fact that suggests informal methods of investigating cases and sharing information and evidence will only increase.⁶⁴

The U.S. federal–foreign law enforcement situation ultimately will become more difficult than the situation witnessed at the time of the *Elkins* decision. Unlike federal–state partnerships, U.S. federal law enforcement agents are particularly dependent on their foreign law enforcement partners to enforce U.S. statutes with extraterritorial implications. They have no authority to conduct investigations, arrests, or seizures on their own beyond U.S. territorial limits. “Sovereignty requires that most international law enforcement efforts be bilateral, cooperative ventures.”⁶⁵ As the United States increases the number of statutes with extraterritorial jurisdiction, it is driven to ever more cooperation with foreign law enforcement. It is inevitable that the path will continue to be muddled as nation-states work ever more closely together.

62. See generally MICHAEL ABBELL, OBTAINING EVIDENCE ABROAD IN CRIMINAL CASES 2010, at 145–204 (2010). Jurisdictions with which the United States has a bilateral mutual legal assistance treaty in force include Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Belize, Brazil, Bulgaria, Canada, China, Cyprus, the Czech Republic, Denmark, Dominica, Egypt, Estonia, the European Union, Finland, France, Germany, Greece, Grenada, Hong Kong, Hungary, India, Ireland, Israel, Italy, Jamaica, Japan, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malaysia, Malta, Mexico, Morocco, the Netherlands, Nigeria, Panama, the Philippines, Poland, Portugal, Romania, Russia, the Slovak Republic, Slovenia, South Africa, Spain, St. Kitts & Nevis, St. Lucia, St. Vincent and the Grenadines, Sweden, Switzerland, Thailand, Trinidad and Tobago, Turkey, Ukraine, the United Kingdom (including the Cayman Islands, Anguilla, the British Virgin Islands, Montserrat, and the Turks and Caicos Islands), Uruguay, and Venezuela. U.S. DEP’T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2012 (2012), <http://www.state.gov/documents/organization/202293.pdf>.

63. See ETHAN NADELMANN, COPS ACROSS BORDERS 315–28 (1993) (discussing legal assistance treaties generally and American efforts to negotiate such a treaty with Switzerland).

64. For example, the FBI has legal attaché offices and smaller sub-offices in over seventy-six key cities around the globe. These offices provide coverage for more than 200 countries, territories, and islands. *International Operations*, FED. BUREAU INVESTIGATION, http://www.fbi.gov/about-us/international_operations (last visited Oct. 19, 2013). The DEA has eighty-six foreign offices in sixty-seven countries, U.S. Drug Enforcement Admin., *Foreign Office Locations*, U.S. DEP’T JUST., <http://www.justice.gov/dea/about/foreignoffices.shtml> (last visited Oct. 19, 2013), and Immigration and Customs Enforcement has seventy-five offices in forty-eight foreign countries around the world. *International Affairs*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/about/offices/homeland-security-investigations/oia> (last visited Oct. 19, 2013).

65. Nadelmann, *supra* note 4, at 41 (noting also that “[t]he sovereign power of states forecloses unilateral police action by one state in the territory of another”).

In a federal–state investigation, by contrast, the federal government retains broad powers to conduct its own investigation, regardless of the state in which the criminal conduct occurs. It may choose to rely on state or local law enforcement as a force multiplier, but it is by no means required to do so. On the other hand, the United States has little power to directly enforce its extraterritorial laws beyond its borders.

3. Current Joint Venture Analysis Undermines Our Constitutional Commitments to Justice and Fairness

Courts acknowledge that the purpose of the joint venture analysis is to ensure that U.S. law enforcement agents do not use the participation of foreign governments as a mechanism to violate the Constitution by “circuitous and indirect methods.”⁶⁶ But, as the Court observed in *Elkins*, application of a more lenient standard in one scenario will inevitably tempt law enforcement to “at least tacitly . . . encourage state officers in the disregard of constitutionally protected freedom.”⁶⁷

There is no reason to think that the situation will play out any differently in the international arena. In fact, because courts now employ a much narrower lens when determining the existence of a “joint venture” in a foreign–federal partnership,⁶⁸ the potential for disregard of constitutional rights has grown. Under the existing framework, U.S. law enforcement agents can provide a great deal of guidance to foreign law enforcement agencies and benefit from a great deal of information before they ever cross the line into a “joint venture.”⁶⁹ As long as they manage to stay on the right side of it, U.S. agents’ power to obtain evidence without the cumbersome requirements of our Fourth Amendment is quite broad.⁷⁰

This dynamic will become more stark as law enforcement officers increasingly work side by side with their foreign counterparts; case law suggests that as long as the foreign law enforcement agency makes its own decisions, or shares a common criminal target with the United States, it could essentially turn over all of its evidence to the United States for prosecution in the United States without any serious inquiry into the methods used to gather this evidence. This practice is not as far-fetched as it may sound. Particularly in countries plagued by corruption or struggling with the existence of dysfunctional courts, foreign investigators have an

66. *United States v. Barona*, 56 F.3d 1087, 1105 (9th Cir. 1995) (Reinhardt, J., dissenting); *Stonehill v. United States*, 405 F.2d 738, 744 (9th Cir. 1968); cf. *Byars v. United States*, 273 U.S. 28, 32 (1927).

67. *Elkins v. United States*, 364 U.S. 206, 221–22 (1960).

68. See *supra* Section I.B.

69. See *id.*

70. See King, *supra* note 46, at 511 (arguing that federal courts are finding a joint venture “only when the United States actually seizes evidence during a foreign search or when U.S. conduct makes the foreign seizure possible”).

incentive to seek prosecution of high-value defendants in U.S. courts, where they may be more likely to face severe penalties and serve their sentences. Furthermore, the United States often encourages this practice for these same reasons. But, it is precisely for these reasons—corrupting influences and insufficient judicial oversight—that U.S. courts should be particularly cautious when relying on evidence secured in foreign nations.

Likewise, many of the countries with whom we partner do not have or have not historically had the same respect for human and civil rights. It is not surprising, as transnational criminal actors are likely to go where the rule of law is weaker and where they will have greater ability to act with impunity. In these same communities, however, police may exercise an undue influence over civilians and easily trample rights that we take for granted.⁷¹ As a result, the consequences of unquestioningly relying on foreign evidence in a U.S. trial are potentially far greater than relying on evidence seized by state authorities.

Ultimately, the *Elkins* Court concluded that the only way to counter this pressure was to impose equal standards on evidence obtained by law

71. Without intending to single out particular countries, it is useful to consider recent Human Rights Watch and U.S. State Department Human Rights Reports for just a few of the countries with which the United States frequently interacts to fight transnational crime. *See, e.g.*, HUMAN RIGHTS WATCH, WORLD REPORT 2012: MEXICO 1 (2012), http://www.hrw.org/sites/default/files/related_material/mexico_2012.pdf (“Efforts to implement comprehensive reform of the criminal justice system, which would address endemic problems such as torture to extract confessions, continued to progress slowly in 2011, leaving in place a system rife with abuses. . . . While engaging in law enforcement activities, the armed forces have committed serious human rights violations, including killings, torture, and enforced disappearances. Mexico’s National Human Rights Commission has issued detailed reports of nearly 90 cases since 2007 in which it found that members of the army had committed serious human rights abuses, and it has received complaints of nearly 5,800 additional human rights violations from 2007 to October 2011.”); HUMAN RIGHTS WATCH, WORLD REPORT 2012: GUATEMALA 2 (2012), http://www.hrw.org/sites/default/files/related_material/guatemala_2012.pdf (characterizing the police and the prosecutorial and judicial systems as “[d]eficient and corrupt . . . [and] contribut[ing] to Guatemala’s alarmingly low prosecution rate”); U.S. DEP’T OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: NICARAGUA 2–3 (2010), <http://www.state.gov/documents/organization/160471.pdf> (“Although the law prohibits such practices, human rights and other NGOs received complaints that police frequently abused suspects during arrest; often used excessive force, including beatings on body areas that do not bruise easily; or engaged in degrading treatment that caused injuries to criminal suspects during arrests.”); U.S. DEP’T OF STATE, 2010 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: GHANA 1 (2010), <http://www.state.gov/documents/organization/160124.pdf> (“Human rights problems included the following: use of excessive force by police, which resulted in deaths and injuries; . . . prolonged pretrial detention; arbitrary arrest of journalists; [and] corruption in all branches of government”); U.S. DEP’T OF STATE, 2011 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: RUSSIA 1 (2011), <http://www.state.gov/documents/organization/186609.pdf> (“Individuals who threatened powerful state or business interests were subjected to political prosecution, as well as to harsh conditions of detention. The conditions of prisons constituted a major violation of the human rights of many prisoners These conditions at times resulted in death. The government did not take adequate steps to prosecute or punish most officials who committed abuses, resulting in a climate of impunity.”).

enforcement, regardless of whether officials acted for a state or federal agency.⁷² This conclusion is one that we should adopt here.

II. APPLYING THE FOURTH AMENDMENT TO EXTRATERRITORIAL SEARCHES

As noted, courts uniformly reject the application of the Fourth Amendment to extraterritorial searches unless the foreign government acts at the behest of the United States and the victim has substantial connections to the United States. Why courts should reconsider their answers in light of twenty-first century cross-border investigations is considered in more detail in these next sections.

The most comprehensive exegesis on the extraterritorial application of the Fourth Amendment is found in *United States v. Verdugo-Urquidez*.⁷³ The Court broke its analysis down into two key questions. First, who are “the people” entitled to the protections of the Fourth Amendment? Second, what is the scope of the harm the Fourth Amendment covers?

In *Verdugo-Urquidez*, the Court overturned the appellate court and held that the Fourth Amendment did not apply to the search and seizure by U.S. federal agents of a foreign defendant’s property located in a foreign country.⁷⁴ Rene Verdugo-Urquidez, a Mexican national living in Mexico, was charged in a U.S. federal court with violating various U.S. federal narcotics statutes.⁷⁵ Mexican police arrested him in Mexico based on the request of the United States and transferred him to U.S. custody so that he could face these charges in the United States.⁷⁶ After the defendant was arrested, U.S. Drug Enforcement Agency (DEA) agents sought to search his Mexican residences for evidence related to the charges Verdugo-Urquidez faced in the United States.⁷⁷ The DEA agents did not seek a search warrant from an American court or even from a Mexican court.⁷⁸ Instead, they obtained authorization for the search from the head of the Mexican Federal Judicial Police.⁷⁹ During the search they found evidence that substantiated the U.S. charges.⁸⁰ When the defendant moved to suppress evidence obtained during the search and argued that the search violated his rights under the Fourth Amendment, the district court granted the motion and the appellate court affirmed and held that the Constitution imposes constraints on the federal government when it acts abroad.⁸¹ A

72. *Elkins*, 364 U.S. at 221–22.

73. 494 U.S. 259 (1990).

74. *Id.* at 266–67, 275.

75. *Id.* at 262.

76. *Id.*

77. *Id.*

78. *See id.* at 262–63.

79. *See id.* at 262.

80. *See id.* at 262–63.

81. *Id.* at 263; *see also* Michael J. Bulzomi, *Investigating International Terrorism Overseas*:

plurality⁸² of the U.S. Supreme Court disagreed and reversed.⁸³

The initial conclusion driving the Court's rejection of Verdugo-Urquidez's claims was that as a foreign national who lived primarily in Mexico, Verdugo-Urquidez was not one of "the people" who had a Fourth Amendment right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."⁸⁴ The Supreme Court determined that Fourth Amendment protections extended only to those defendants who are citizens or who have a "sufficient connection" to the United States such that they are part of the community of the governed.⁸⁵ Because Verdugo-Urquidez was not voluntarily a member of the American community, he was insufficiently connected to the United States, said the Court, so the Fourth Amendment could not protect him from the overreaching of U.S. federal agents.⁸⁶

The second conclusion that underpinned the *Verdugo-Urquidez* decision was that the scope of the Fourth Amendment inquiry was limited to the moment of the search itself. The Court distinguished a Fourth Amendment violation from a "fundamental trial right" found in the Fifth Amendment, and argued that a violation of the Fourth Amendment is "'fully accomplished' at the time of an unreasonable governmental intrusion."⁸⁷ Implicit in the Court's reasoning was that the "unreasonable governmental intrusion" ended when the search and seizure ended. "Whether evidence . . . should be excluded at trial in the United States is a remedial question separate from the existence *vel non* of the constitutional violation."⁸⁸ Because it determined that there could not be a constitutional violation for a search and seizure conducted in Mexico to an individual

Constitutional Considerations, FBI L. ENFORCEMENT BULL., July 2002, at 25, 27.

82. There is a discord between the federal courts and commentators in interpreting *Verdugo-Urquidez*. See Bentley, *supra* note 6, at 361 n.137. The federal courts have interpreted Chief Justice Rehnquist's opinion as a majority opinion since it nominally had the support of five justices. See *id.*; *Verdugo-Urquidez*, 494 U.S. at 261 (noting that Justices Byron White, Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy joined Chief Justice William Rehnquist's opinion). However, numerous commentators have noted that Justice Kennedy, although joining Chief Justice Rehnquist's opinion, wrote a concurring opinion fundamentally at odds with that opinion. Bentley, *supra* note 6, at 343 & n.53. Although the commentators' interpretation appears to be more theoretically consistent, in the interest of practicality to litigators in the federal court system, this Article will refer to Chief Justice Rehnquist's opinion as the majority opinion.

83. *Verdugo-Urquidez*, 494 U.S. at 275.

84. U.S. CONST. amend. IV, cited in *Verdugo-Urquidez*, 494 U.S. at 264–65.

85. See *Verdugo-Urquidez*, 494 U.S. at 265.

86. *Id.* at 270–73.

87. *Id.* at 264 (citing *United States v. Calandra*, 414 U.S. 338, 354 (1974) and *United States v. Leon*, 468 U.S. 897, 906 (1984)); see also Mary Lynn Nicholas, Comment, *United States v. Verdugo-Urquidez: Restricting the Borders of the Fourth Amendment*, 14 FORDHAM INT'L L.J. 267, 283 (1991) (noting that the Court in *Verdugo-Urquidez* stressed "that the place where an alleged constitutional violation occurs is significant").

88. *Verdugo-Urquidez*, 494 U.S. at 264 (citing *Calandra*, 414 U.S. at 354).

without a sufficient connection to the United States, the Court never reached an answer to that remedial question.

A. *(Re)Defining the Scope of the Unreasonable
Government Intrusion*

Because the definition of “people” arguably depends on the scope of the Fourth Amendment intrusion, the reassessment of the *Verdugo* opinion should begin out of order—by looking first at the scope of the intrusion before considering the definition of the word “people.”

As noted, the Court limited its consideration of the “unreasonable governmental intrusion” to the search itself. Because the search itself took place outside of the United States, where the Fourth Amendment had no effect, there was no situation where the Fourth Amendment would apply.⁸⁹ This initial conclusion is inconsistent with several key cases applying the Fourth Amendment.⁹⁰ In fact, the Court recognizes time and again that it is the “use of the seized evidence” that denies “the constitutional rights of the accused.”⁹¹ The evidence is not used until the defendant is charged, held, convicted, or imprisoned. Each stage in the criminal process—and particularly the criminal trial—creates one more opportunity for the government to intrude into the defendant’s privacy. As the Court in *Weeks* concluded:

If letters and private documents can thus be seized *and held and used in evidence against a citizen accused of an offense*, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.⁹²

89. Given that the search was conducted by U.S. federal law enforcement, and the Fourth Amendment provides limitations on the ability of U.S. federal law enforcement to act, there is a good argument that the Fourth Amendment should have applied regardless of any subsequent U.S. action. It is puzzling, at the very least, that the majority did not find that there was a joint venture. Because the majority concluded that the defendant was not sufficiently connected to the United States and did not have a right to Fourth Amendment protections in the first place, it never reached the question of whether U.S. federal law enforcement acted within its appropriate scope. The majority also did not answer the question of whether such a search of a U.S. citizen living abroad would violate the Fourth Amendment. Presumably, however, it would have.

90. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (citing *Weeks v. United States*, 232 U.S. 383, 393, 398 (1914), *overruled by* *Elkins v. United States*, 364 U.S. 206 (1960), and *Mapp*, 367 U.S. 643).

91. *Mapp*, 367 U.S. at 648 (emphasis added) (quoting *Weeks*, 232 U.S. at 398) (internal quotation marks omitted).

92. 232 U.S. at 393 (emphasis added). Likewise, Justice Frank Murphy implied a similar analysis in his dissent in *Wolf v. Colorado*, 338 U.S. 25, 41 (1949): “[T]he enforcement of the search and seizure clause in the ordinary case today [is] limited to three devices: judicial exclusion

Concluding otherwise only amplifies the egregiousness of the government intrusion caused by the initial search and seizure.⁹³

Nonetheless, the *Verdugo-Urquidez* Court suggests that this limitation is appropriate because the Fourth Amendment, unlike the Fifth Amendment, is not a trial right.⁹⁴ “A ‘trial right’ is a constitutional right that attaches *only* in the criminal trial setting.”⁹⁵ Yet, this characterization does not compel the conclusion that “[t]he other type of constitutional right,” the “freestanding civil liberty,” that “protects individuals generally from government overreaching in a variety of non-trial settings”⁹⁶ must then ignore the government actions that occur at trial. Arguably, this freestanding civil liberty, found in the Fourth Amendment, should be broader—not narrower—than these more limited trial rights. Divorcing the use of the unreasonably seized evidence by the government at trial from the actual search and seizure is unnecessarily limiting and not required by the Constitution.⁹⁷ By using the term “trial right” to distinguish the Fifth and Sixth Amendments from the Fourth Amendment, the plurality distracts us from the real harms accomplished by the search and seizure.⁹⁸

Likewise, the approach of the plurality in this case puts them at odds with their own brethren as well as jurists in years past. At the outset, “constitutional provisions for the security of person and property should be

of the illegally obtained evidence; criminal prosecution of violators; and civil action against violators in the action of trespass.” In reality, however, “there is but one alternative to the rule of exclusion. That is no sanction at all.” *Id.* Justice Murphy acknowledged that the most significant harm—the government intrusion on the individual’s liberty—attaches at the time the defendant is faced with the illegally seized evidence at trial. *See id.*

93. Even the earliest of judicial opinions on the subject of the government’s authority to act appear to support this conclusion. *See, e.g.,* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”).

94. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).

95. Godsey, *supra* note 8, at 874 (emphasis added).

96. *Id.* (internal quotation marks omitted).

97. *See* Emmanuel Kojo Bentil, Note, *United States v. Verdugo-Urquidez: The U.S. Supreme Court’s Effort to Halt the Trade in Illegal Drugs*, 15 N.C. J. INT’L L. & COM. REG. 511, 527 (1990) (“By reading this provision in isolation, rather than in light of and in conjunction with the Fifth and Sixth Amendments, the Court gives aliens a right to a fair trial by conceding the applicability of the Fifth and Sixth Amendments, while in the same motion effectively taking this right away.”).

98. This analysis is not to suggest that the Fourth Amendment may not warrant a greater connection to the United States than the Fifth or Sixth Amendment. It may be that for the purposes of determining a basis for a civil suit under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), or a criminal action against the agents, the search itself, conducted in a vacuum and without additional contact between the subject and the U.S. government, would not sufficiently connect a foreign national to the United States. However, that was not the whole story for *Verdugo-Urquidez* and is not the context in which this particular right and the attendant harms come into play.

liberally construed.”⁹⁹ It follows that the right to privacy should be considered in its entirety, and not at one brief moment in time without regard for the government’s continued engagement with a defendant. In fact, as argued later in this Article,¹⁰⁰ the Court’s decision in *Wolf v. Colorado*¹⁰¹ compels this conclusion.

For these reasons, courts should widen their aperture when they consider whether there is a sufficiently “unreasonable government intrusion” such that a defendant may claim Fourth Amendment protections. If there is only a search and seizure of a foreign national’s property, and no other conduct to establish a governing relationship between the United States and that foreign national, the reasoning of *Verdugo-Urquidez* may stand. If, however, the U.S. government expands its jurisdiction over a foreign national such that it seeks to impose the enforcement of its sovereign criminal laws upon him, the protections of the Fourth Amendment should extend retroactively to the pretrial investigative stage—essentially cloaking the foreign national “with constitutional protection[s] after the fact, even though [he was] located outside of the United States and thus [was] not initially protected by the Bill of Rights at the time that the alleged constitutional violation occurred.”¹⁰² This “backward looking” application of the Fourth Amendment is not unlike the Courts’ Fifth Amendment analyses.¹⁰³

B. Rethinking Who Constitutes the “People”

The *Verdugo-Urquidez* Court rejected the notion that the defendant’s trial in U.S. court was sufficient to establish a “substantial connection” to the United States.¹⁰⁴ As a result, he could not seek the protections afforded by the Fourth Amendment.¹⁰⁵ The Court divined the Framers’ intent in

99. *Boyd v. United States*, 116 U.S. 616, 635 (1886), *abrogated on other grounds by* *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).

100. *See infra* Section III.B.

101. 338 U.S. 25 (1949), *overruled in part by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

102. Godsey, *supra* note 8, at 874. This position advances an idea that is both fundamentally at odds with and a variation of the theme put forward by Godsey, who argued that trial rights such as those protected by the Fifth Amendment invariably protect non-Americans abroad, while freestanding civil liberties, such as those enshrined in the Fourth Amendment, do not. Godsey accepts the Supreme Court’s rationale distinguishing the Fifth and Sixth Amendments from other amendments without questioning it. But if we put aside the limitation the Court imposes and Godsey accepts, his analysis of the way a court should view a Fifth Amendment violation (by starting at trial and looking backwards to the moment of the compelled statement) is a useful way of considering a Fourth Amendment violation as well.

103. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 283–84 (1990) (Brennan, J., dissenting) (arguing that where the “sufficient connection” is supplied by the government through its investigation and attempts to hold the defendant accountable under U.S. criminal laws, “[the defendant] is entitled to the protections of the Fourth Amendment”).

104. *Id.* at 264, 271 (plurality opinion).

105. *See id.* at 274–75. The majority essentially adopted a variation of the view that the

using the phrase “the people,” and argued that the Court should limit the Fourth Amendment only to “a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”¹⁰⁶ To reach this conclusion, the Court found nothing in the Constitution to suggest that the Framers meant for its provisions to reach outside the United States.¹⁰⁷ In particular, the plurality relied on several examples in which the United States took actions against foreign nationals without limiting its ability to search and seize—citing as examples the “undeclared war” with France in 1798 and arrests of enemy aliens following World War II for war crimes.¹⁰⁸ The Court did not define what would constitute a “substantial connection” but rejected the notion that a defendant could involuntarily become a member of this community through arrest and trial by U.S. authorities.¹⁰⁹

Missing from the majority’s analysis is recognition of the evolution of U.S. jurisdictional reach over the behavior of foreign nationals for law enforcement purposes, even if the individual never stepped foot inside the jurisdictional boundaries of the United States.¹¹⁰ The power of law enforcement—as opposed to the military, for example—to exercise this authority is strictly governed by the Constitution and more particularly, the Fourth Amendment.¹¹¹ Enforcing the public safety is at the heart of this social contract and at the heart of the Constitution.¹¹² More to the point, we

Constitution is a social contract limited to the American people and their government. *See The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 280–81 (1990); *see also* Roszell Dulany Hunter, IV, Note, *The Extraterritorial Application of the Constitution—Unalienable Rights?*, 72 VA. L. REV. 649, 651–53 (1986) (discussing the contract metaphor). The majority maintained that a foreign national may have a basis for claiming the protections of the Fifth or Sixth Amendment when tried in the United States.

106. *Verdugo-Urquidez*, 494 U.S. at 265 (citing *U.S. ex rel. Turner v. Williams*, 194 U.S. 279, 292 (1904)).

107. *See id.* at 266.

108. *Id.* at 267–69.

109. *See id.* at 271–72. Similarly, because the Framers used the “relatively universal term of ‘person’” in the Fifth Amendment but the Court “rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States,” the Court found that the more restricted term “the people” as used in the Fourth Amendment clearly made the Fourth Amendment inapplicable extraterritorially. *See id.* However, the Court suggested that a foreign national tried within the United States may be able to make a claim of entitlement to Fifth Amendment protections. *Id.* at 264.

110. *See supra* text accompanying note 4.

111. *See Weeks v. United States*, 232 U.S. 383, 391–92 (1914) (stating that the “effect of the Fourth Amendment” is to limit and restrain federal actors “in the exercise of their power and authority”), *overruled by* *Elkins v. United States*, 364 U.S. 206 (1960), and *Mapp v. Ohio*, 367 U.S. 643 (1961); *see also* Richard J. Dolan, Note, *Aliens’ Fourth Amendment Rights Against Government Searches Abroad: United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988), cert. granted, 109 S. Ct. 1741 (1989), 64 WASH. L. REV. 701, 713–14 (1989).

112. *See Nadelmann, supra* note 4, at 41 (“[A] United States police officer . . . has no power

have no mechanism to enforce these extraterritorial federal statutes unless we bring a defendant into our jurisdiction and subject them to our laws and criminal procedures. If we are forcing a social contract with these hapless figures, by searching their homes, by seizing their property, by forcing them to stand trial for the impact of their actions in the United States, and ultimately by imprisoning them in U.S. prisons, then it cannot follow that we are exempt from our own rules governing law enforcement conduct. This “enforcement of domestic criminal law” is the “paradigmatic exercise of sovereignty over those who are compelled to obey.”¹¹³ For that reason, courts should reject the reasoning of the *Verdugo-Urquidez* plurality. If a person is tried in a U.S. court for violating a U.S. federal statute to face possible imprisonment in a U.S. federal prison, courts should consider that individual a member of “the people” and she should receive the benefits of U.S. constitutional protections. Following any other path creates a parallel set of standards that is wholly inconsistent with the “conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.”¹¹⁴

III. APPLYING THE FOURTH AMENDMENT TO THE CONDUCT OF FOREIGN AUTHORITIES

A. *Applying the Fourth Amendment to Law Enforcement Acting Outside the Territorial Boundaries of the United States*

Even if the defendant is determined to be one of “the people” for purposes of Fourth Amendment application, there is a second unresolved question of whether law enforcement conduct—either by U.S. officials or by foreign governments working with them—committed outside the United States can violate the Fourth Amendment. The Supreme Court in *Reid v. Covert*¹¹⁵ concluded that the Constitution limits U.S. law enforcement conduct abroad.¹¹⁶ Although the Court in *Reid* did not itself

to compel anyone to do anything outside United States territory. The same is true of the United States prosecutor A state can claim extraterritorial effect for its criminal laws but cannot directly enforce those laws beyond its borders.”).

113. *Verdugo-Urquidez*, 494 U.S. at 297 (Blackmun, J., dissenting) (distinguishing these circumstances from the government’s exercise of power abroad, which does not ordinarily implicate the Fourth Amendment).

114. *Wolf v. Colorado*, 338 U.S. 25, 28 (1949), *overruled in part* by *Mapp v. Ohio*, 367 U.S. 643 (1961).

115. 354 U.S. 1 (1957).

116. *Id.* at 5–6 (“At the beginning we reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.” (footnote omitted)); *see also id.* at 8–9 (“This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States. While it has been suggested that only those constitutional rights which are ‘fundamental’ protect Americans abroad, we can find no

specify whether the Constitution applies only to citizens or extends to aliens,¹¹⁷ the Court reasoned that the government “can only act in accordance with all the limitations imposed by the Constitution.”¹¹⁸ Its reasoning appears to go only to the question of the government’s *authority* to act. Although the Court does not make the distinction, it could equally be used to justify limiting governmental action against foreign nationals.¹¹⁹ In fact, as the *Reid* Court points out, the powers of law enforcement to investigate, of judges to convict and sentence, and of officials to imprison an individual, all derive from the Constitution; so, it seems incongruent to use *Reid* for the proposition that the government is permitted to act outside the Constitution in particular circumstances.¹²⁰

Nonetheless, the *Verdugo-Urquidez* Court spent much time limiting the holding of *Reid*, and suggested that courts should read *Reid* to apply only to *citizens*—as opposed to “people” who are otherwise connected to the United States—and only to the protections of the Fifth and Sixth Amendments.¹²¹ Courts should limit the Fourth Amendment to conduct inside the United States, argued the majority, because the Framers intended to restrict only those searches and seizures that might be conducted by the *federal* government in *domestic* matters.¹²²

The Court’s rationale for limiting *Reid* should be reexamined and rejected. At the outset, reliance on the original intent of the Framers does not get us far. In 1789, the Framers could not contemplate the existence of multiple powerful U.S. federal law enforcement agencies with attachés stationed in hundreds of countries overseas enforcing U.S. laws.¹²³ Likewise, there is no evidence to suggest that the Framers ever

warrant, in logic or otherwise, for picking and choosing among the remarkable collection of ‘Thou shalt nots’ which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.” (footnotes omitted)).

117. See Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 23–24 (1985).

118. *Reid*, 354 U.S. at 5–6, quoted in *Verdugo-Urquidez*, 494 U.S. at 281 (Brennan, J., dissenting).

119. In fact, Justice Brennan, in his dissent in *Verdugo-Urquidez* does just that. See *Verdugo-Urquidez*, 494 U.S. at 281 (Brennan, J., dissenting).

120. See *Reid*, 354 U.S. at 12; see also *Verdugo-Urquidez*, 494 U.S. at 281 (Brennan, J., dissenting) (quoting *Reid*, 354 U.S. at 5–6); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315–16 (1936); Dolan, *supra* note 111, at 713.

121. *Verdugo-Urquidez*, 494 U.S. at 269–70.

122. *Id.* at 266 (“What we know of the history of the drafting of the Fourth Amendment also suggests that its purpose was to restrict searches and seizures which might be conducted by the United States in domestic matters. The Framers originally decided not to include a provision like the Fourth Amendment, because they believed the National Government lacked power to conduct searches and seizures.” (citing CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 508–09 (1928); *THE FEDERALIST* No. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961); 1 *ANNALS OF CONG.* 437 (1789) (statement of James Madison))).

123. See *supra* note 64.

contemplated that the U.S. federal government might seek to stretch its long arms into the homes of foreign nationals for the purposes of prosecuting them, or that the Framers considered and rejected the Fourth Amendment's application to such a scenario. It is not analogous to consider the Framers' views in the context of war, whether undeclared or not, as the Court suggests, or in any other scenario involving conflicts between sovereign nations.¹²⁴ These are not situations where the United States exercises its sovereign jurisdiction over a foreign national for which that individual faces *criminal* penalties in an Article III court.

The situation described in *Verdugo-Urquidez*, unlike conflicts between sovereign nations, epitomizes run-of-the-mill public safety violations, typically investigated by traditional law enforcement agents—albeit where the evidence and defendant are located outside the United States.¹²⁵ It is most logical, therefore, that we should approach this question from a law enforcement perspective and rely on traditional law enforcement guidelines.¹²⁶

That the *Verdugo-Urquidez* Court's holding was less than convincing on this particular point is evidenced by the fact that lower courts in the years since have continued to engage in a Fourth Amendment analysis of evidence obtained overseas, particularly in the context of evidence seized from U.S. citizens *and often resident aliens* abroad.¹²⁷ In fact, lower courts consistently hold that the Fourth Amendment's reasonableness standard applies to U.S. officials conducting a search affecting a U.S. citizen in a

124. See *Verdugo-Urquidez*, 494 U.S. at 267, 269, 273–75.

125. See Bentley, Jr., *supra* note 6, at 414–17 (distinguishing the national security concerns identified by the majority in *Verdugo-Urquidez* from situations in which constitutional protections are applied only to those whom the government treats as “the governed,” for example by investigating and prosecuting them); see also *Verdugo-Urquidez*, 494 U.S. at 297 (Blackmun, J., dissenting) (distinguishing between the government's “exercise of power abroad [which] does not ordinarily implicate the Fourth Amendment,” and “the enforcement of domestic criminal law[, which] seems to me to be the paradigmatic exercise of sovereignty over those who are compelled to obey”).

126. See Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 912 (1991) (noting that Chief Justice Rehnquist's reliance on “‘history and case law’ as tending to show that nonresident aliens have no constitutional rights against agents of the United States acting outside its borders” mistakenly assumed “that examples drawn from two centuries of American constitutional history could all be reconciled, and that the governing principles had not changed over this period. . . . The principles determining the Constitution's coverage have been sharply controverted during those two hundred years, and different approaches have been dominant at different times. The authors of the Bill of Rights almost certainly viewed *everyone's* constitutional rights as territorially restricted by the national boundaries; that view is utterly discredited today, and the question whether nonresident aliens' rights should continue to be so restricted cannot be answered by direct recourse to eighteenth-century practice.” (footnote omitted)).

127. See, e.g., *United States v. Juda*, 46 F.3d 961, 968–69 (9th Cir. 1995); *United States v. Peterson*, 812 F.2d 486, 490 (9th Cir. 1987); *United States v. Adler*, 605 F. Supp. 2d 829, 835–38 (W.D. Tex. 2009).

foreign country.¹²⁸ The far less clear conclusion is whether and when the Fourth Amendment will reach the conduct of foreign law enforcement.

B. Applying the Fourth Amendment to the Conduct of Foreign Law Enforcement Through the Due Process Clause

There is no question that our Constitution cannot bind the conduct of foreign authorities. It is a very different question whether and when it binds the conduct of U.S. authorities—whether it be the investigators, the prosecutors, the judge, or the prison warden. It is also a different question as to when constitutional protections attach to a foreign, nonresident defendant. The point where these questions collide is determining the time the defendant becomes subject to the full force of U.S. sovereignty. The arrows all point to one conclusion: where the defendant is made a member of the “people” because he faces charges for violating U.S. federal statutes in the U.S. criminal justice system, and where the evidence seized is used by federal prosecutors in a U.S. federal civilian court with the goal of depriving the defendant of his liberty, courts should apply a reasonableness standard to the admission of evidence, regardless of the country of origin of that evidence.¹²⁹

The Supreme Court’s decision in *Wolf v. Colorado* suggests that the way to enforce the Fourth Amendment right to privacy for evidence used at trial is through the Due Process Clause of the Fifth Amendment.¹³⁰ Prior to *Wolf*, federal courts employed the silver platter doctrine based on their understanding that the Fourth Amendment governed only the conduct of federal investigators; state investigators were subject to their own constitutional limitations.¹³¹ The power of the Court’s decision in *Wolf* was its finding that “[t]he security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to

128. See, e.g., *Juda*, 46 F.3d at 968; *Peterson*, 812 F.2d at 490; *Adler*, 605 F. Supp. 2d at 838.

129. Clearly, there is tension between our constitutional protections (for example, requirements and methods for securing warrants) and foreign legal requirements, particularly where there is no similar structure within the foreign government. As noted earlier, the questions of what is “reasonable” and whether the reliance on foreign law is an appropriate standard for reasonableness is best left for another time. For an interesting discussion of that topic, see Bentley, Jr., *supra* note 6, at 361–70.

130. Cf. *Boyd v. United States*, 116 U.S. 616, 633 (1886) (“We have already noticed the intimate relation between the [Fourth and Fifth] [A]mendments. They throw great light on each other. For the ‘unreasonable searches and seizures’ condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man ‘in a criminal case to be a witness against himself,’ which is condemned in the Fifth Amendment, throws light on the question as to what is an ‘unreasonable search and seizure’ within the meaning of the Fourth Amendment.”), *abrogated on other grounds by* *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967). See generally Miller, *supra* note 6, at 870–71.

131. See Nathan & Man, *supra* note 6, at 831 n.38.

a free society.”¹³² These basic rights are rights that the federal courts must enforce to ensure due process of law.¹³³ Therefore, to ensure the protection of this basic right of freedom—the right to be free from unreasonable searches—courts must, through the power of the Due Process Clause, equally apply the tenants of the Fourth Amendment in its review of state searches, as well as federal searches.¹³⁴

Explicit in the *Wolf* opinion is that the Due Process Clause prohibits an American court from sanctioning a violation of this basic right. It is simply inconsistent with our commitment to a free society. It is not a stretch to import this same standard to searches conducted by foreign authorities when the fruits of the search are used in an American court.¹³⁵ If due process is the basis for guarding this basic right to freedom against intrusions by state actors, then due process should do the same to ensure that any defendant—including a foreign defendant—tried in a U.S. court is not deprived of life, liberty, or property based on an unreasonable search.¹³⁶ So concluding would remain consistent with the “living principle” at the heart of the right articulated in *Wolf* and subsequent cases.¹³⁷

132. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), *overruled in part by* *Mapp v. Ohio*, 367 U.S. 643 (1961).

133. *See id.* at 27 (“Due process of law thus conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society.”).

134. *See Rochin v. California*, 342 U.S. 165, 169 (1952) (holding that due process requires the constitutional guarantee of respect for those personal immunities considered fundamental or “implicit in the concept of ordered liberty” (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784 (1969))); *Hanna v. United States*, 260 F.2d 723, 726 (D.C. Cir. 1958) (“[T]he Fourth Amendment prohibition of unreasonable searches and seizures is to be read into the Fourteenth Amendment as a requirement of due process of law.”). Note that the *Wolf* Court came to its conclusion because it found the right to protection from unreasonable searches to be so basic to a free society that “were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment,” as opposed to any notion that the Fourteenth Amendment merely incorporated the first eight amendments. *Wolf*, 338 U.S. at 28.

135. *Hurtado v. California*, 110 U.S. 516, 534 (1884) (assuming that the Fourteenth Amendment Due Process Clause has the same content as the Fifth Amendment Due Process Clause); *see* Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 330 (2001) (arguing that the Fourteenth and Fifth Amendments guarantee the same protections).

136. *See, e.g.,* Miller, *supra* note 6, at 870–71; *The Supreme Court, 1989 Term—Leading Cases*, *supra* note 105, at 276, 285. Alternatively, some of the considered harms could be mitigated by significantly expanding the joint venture doctrine to apply more broadly to situations where a U.S. prosecutor in a U.S. court relies on evidence seized in a foreign jurisdiction to deprive an individual of his liberty. The conclusion could also meet some of the public policy goals otherwise identified in this Article.

137. *Wolf*, 338 U.S. at 27 (“[D]ue process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights. To rely on a tidy formula for the easy determination of what is a fundamental right for purposes of legal

Courts flirted with this conclusion before and Justice Kennedy, in his concurrence in *Verdugo-Urquidez*, explicitly acknowledged, “All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant.”¹³⁸ Nonetheless, despite the reasoning underpinning the Court’s decision in *Wolf*, courts consistently impose a higher bar before they find that a foreign search violates the Due Process Clause.¹³⁹ Rather than looking to whether the search was “reasonable,” they ask whether the search “shocked the conscience.”¹⁴⁰ “Searches found to violate the shock-the-conscience standard are extraordinary and typically only include cases in which a defendant was physically coerced in order to obtain evidence.”¹⁴¹ This high standard is inconsistent with that articulated by the Supreme Court and was explicitly rejected when evaluating the conduct of state law enforcement.¹⁴² “To the victim it matters not [who

enforcement may satisfy a longing for certainty but ignores the movements of a free society. It belittles the scale of the conception of due process. The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of ‘inclusion and exclusion.’” (quoting *Davidson v. New Orleans*, 96 U.S. 97, 104 (1877)); see *The Supreme Court, 1989 Term—Leading Cases*, *supra* note 105, at 285 (suggesting that the Due Process Clause “may be viewed as an effective approximation of a flexible fourth amendment standard adapted to differing international expectations of reasonableness and applied with a view toward separation of powers concerns”). Furthermore, even the *Verdugo-Urquidez* Court agreed that the Fifth Amendment—which uses the term “person” versus “people”—may apply at the trial of a foreign national in a U.S. court. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990).

138. *Verdugo-Urquidez*, 494 U.S. at 278 (Kennedy, J., concurring). Justice Kennedy also noted that the Due Process Clause of the Fifth Amendment protects a defendant from egregious violations of her basic human rights. See *id.* (noting that the question is “what process is due a defendant in the particular circumstances of a particular case” (quoting *Reid v. Covert*, 352 U.S. 1, 75 (1957) (Harlan, J., concurring in the result)) (internal quotation marks omitted)).

139. See *supra* Section I.B.

140. See, e.g., *United States v. Toscanino*, 500 F.2d 267, 273 (2d Cir. 1974) (“This is conduct that shocks the conscience.” (quoting *Rochin v. California*, 342 U.S. 165, 169, 172–73 (1952))); *Stonehill v. United States*, 405 F.2d 738, 745 (9th Cir. 1968); *Birdsell v. United States*, 346 F.2d 775, 782 n.10 (5th Cir. 1965); see also *Rochin v. California*, 342 U.S. 165, 169, 172–73 (1952). As discussed later, some courts, including the Ninth Circuit, hold that the fruits of a search that shock the conscience are excluded under the authority of the court’s supervisory powers. See *United States v. Barona*, 56 F.3d 1087, 1091 (9th Cir. 1995).

141. Mark Mermelstein, *Searching Far & Wide*, L.A. LAW., Nov. 2003, at 33, 38.

142. See *Miller*, *supra* note 6, at 896 (observing “that *Rochin*’s author, Justice Frankfurter, clearly did not intend the doctrine to be limited to brutal law enforcement conduct”); see also *Israel*, *supra* note 135, at 361–67 (discussing the evolution of the Due Process Clause as it applies to trial rights); *Hurtado v. California*, 110 U.S. 516, 521–38 (1884) (discussing the evolution of due process); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855) (noting that the Fifth Amendment “is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress [sic] free to make any process ‘due process of law’”).

invaded] his constitutional right”¹⁴³ The interpretation offered by modern courts offers scant protection against unreasonable searches and scant protection of the Due Process Clause and Fourth Amendment principles.¹⁴⁴

Fortunately, the Court recognizes that “basic rights do not become petrified as of any one time It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right.”¹⁴⁵ As previously detailed, U.S. investigations and prosecutions of transnational crime expanded significantly in recent years and now form the basis of a presidential strategy.¹⁴⁶ The primary way to dismantle the corrosive impact of transnational crime is for the United States to expand its jurisdictional reach and to cultivate foreign law enforcement partnerships to enforce these statutory prohibitions. For that reason, this Article proposes expanding our understanding of the Due Process Clause’s application to extraterritorial searches consistent with the case law. If a U.S. prosecutor in a U.S. court relies on evidence seized in a foreign jurisdiction to deprive an individual of his liberty, then courts should undertake a reasonableness analysis. This approach would recognize “minimum, existing constitutional protections to criminal defendants and institutional requirements of Article III courts.”¹⁴⁷ The conclusion likewise provides law enforcement with the necessary bright lines to promote greater consistency and sustainability.

The practical impact of this idea is foreshadowed by past experience. The success of state–federal task forces around the country in comprehensively attacking pervasive criminal threats is now well known.¹⁴⁸ Even outside of the formal task force model, local police

143. *Elkins v. United States*, 364 U.S. 206, 215 (1960); *see also* *People v. Defore*, 150 N.E. 585, 588 (N.Y. 1926) (“The professed object of the trespass rather than the official character of the trespasser should test the rights of government.”).

144. *See* *Miller*, *supra* note 6, at 871–72; *see also* *Elkins*, 364 U.S. at 222 (“If . . . it is understood that the fruit of an unlawful search by state agents will be inadmissible in a federal trial, there can be no inducement to subterfuge and evasion with respect to Federal– cooperation in criminal investigation. Instead, forthright cooperation under constitutional standards will be promoted and fostered.”).

145. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), *overruled in part by* *Mapp v. Ohio*, 367 U.S. 643 (1961); *see also* *Hurtado*, 110 U.S. at 530–31 (“The Constitution . . . was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues.”).

146. *See* STRATEGY TO COMBAT TRANSNATIONAL ORGANIZED CRIME, *supra* note 1, at 3–4.

147. *Miller*, *supra* note 6, at 906.

148. For example, the Organized Crime Drug Enforcement Task Forces (OCDETF) Program, which was established in 1982 and combines federal, state, and local law enforcement, “is the centerpiece of the United States Attorney General’s drug strategy to reduce the availability of drugs by disrupting and dismantling major drug trafficking organizations and money laundering organizations and related criminal enterprises.”, U.S. DEP’T JUST., ORGANIZED CRIME DRUG ENFORCEMENT TASK FORCES, <http://www.justice.gov/criminal/taskforces/ocdetf.html> (last visited Oct. 13, 2013).

officers often will bring their cases to assistant U.S. attorneys to prosecute for a variety of reasons, including the ability to get stronger sentences in federal versus state courts. There are even model programs based on this concept—for example, Project Exile, initiated in 1997 in Richmond, VA, is credited with significantly lowering the violent crime in that city.¹⁴⁹ There, the U.S. Attorney's Office agreed to prosecute local firearms cases in federal court so as to take repeat offenders off the streets for long periods of time.¹⁵⁰ And, as a result of the Court's decisions in *Wolf* and *Elkins*, if a defendant argues that the local police officer violated his due process rights by committing an unlawful search or seizure, U.S. federal courts immediately turn to the question of reasonableness. There is no discussion as to the extent of the participation of the state with federal government actors.

In these cases, law enforcement realizes a benefit from its ability to bring the case in federal court—for example, because investigators can connect the defendant into a larger-scale, multijurisdictional conspiracy, or because the defendant will almost definitely face more significant and certain sentencing penalties.¹⁵¹ But this benefit comes with the attendant responsibilities. The fact that a city or state police officer conducted the investigation does not let the federal government off the constitutional hook. In fact, the difference in standards leads to a sometimes painful change in investigative practices for local police, as the federal district courts often impose more exacting scrutiny on the investigative practices. But ultimately, no one argues that increasing these standards leads to fewer convictions.¹⁵² The benefits of this cooperative model far outweigh the additional care law enforcement must bring to their investigations. And, in the end, requiring law enforcement to meet a more exacting bar arguably enhances public trust and confidence in law enforcement.¹⁵³

149. See, e.g., *Project Exile: A Case Study in Successful Gun Law Enforcement: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, & Human Res. of the H. Comm. on Gov't Reform*, 106th Cong. 1 (1999) (introductory remarks).

150. See *id.* at 173–76.

151. *Id.* at 2 (statement of Rep. John L. Mica, Chairman, Subcomm. on Criminal Justice, Drug Policy, & Human Res. of the H. Comm. on Gov't Reform) (“The advantage of Federal prosecutions include [sic] stiff bond rules and tough sentences, including minimum mandatory sentences.”).

152. See *Elkins v. United States*, 364 U.S. 206, 218 (1960) (noting that “[e]mpirical statistics are not available” to prove the impact of the exclusionary rule on states, “[b]ut pragmatic evidence of a sort is not wanting [I]t has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted”).

153. See Stephen J. Schulhofer, Tom R. Tyler, & Aziz Z. Huq, *American Policing at a Crossroads: Unsustainable Policies and the Procedural Justice Alternative*, 101 J. CRIM. L. & CRIMINOLOGY 335, 363 (2011) (“[I]n virtually every context studied to date, law enforcement effectiveness has displayed at best only a weak influence on perceived legitimacy, while procedural justice concerns are strongly linked to legitimacy, voluntary compliance, and willingness to cooperate.”).

Federal–foreign law enforcement relationships are not significantly different from federal–state partnerships. Government officials are moving (or have moved) toward situations where they are working more cooperatively to take down a criminal network. In the best examples, law enforcement shares common targets, evidence, and information, and ultimately brings appropriate enforcement actions in the country that has the best tools available based on the evidence.¹⁵⁴ This fluid exchange of information and resources is a positive development in terms of combating transnational crime. But it should not come at the price of sacrificing fundamental civil liberties or tumbling down to the lowest common denominator of police practice. As in the state–federal task force practice, if law enforcement realizes a benefit from its ability to choose the best forum to seek prosecution of a case, then the choice of a U.S. federal district court should come with the attendant responsibilities.

C. If the Search Is Not Reasonable, Exclusion Is the Appropriate Remedy

Regardless of the standard used, courts consistently advocate against exclusion of foreign evidence because they perceive no deterrent effect.¹⁵⁵ This final section questions that premise in light of changing law enforcement practices and offers a second basis for excluding unreasonably seized evidence: preservation of judicial integrity.¹⁵⁶

1. Deterrence

In *Weeks v. United States*,¹⁵⁷ the Supreme Court held that the Fourth Amendment barred the use of evidence secured through an illegal search

154. See Amy E. Pope, *Partnering with Mexico: What Human Trafficking Cases Can Teach Us Moving Forward*, CRIM. JUST., Fall 2012, at 18, 19–20; *Border Enforcement Security Task Force (BEST)*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://www.ice.gov/best> (last visited Oct. 13, 2013) (“On our country’s northern border, Canadian law enforcement agencies like the Canada Border Services Agency, the Royal Canadian Mounted Police, the Ontario Provincial Police, the Niagara Regional Police Service, the Toronto Metropolitan Police, the Windsor Police Service and the Amherstburg Police Service are active members. On the southwest border, the Mexican Secretariat of Public Safety or SSP, and the Colombian National Police have both been active partners in the past, with both the BEST San Diego and BEST San Juan units.”).

155. See, e.g., *United States v. Rose*, 570 F.2d 1358, 1361–62 (9th Cir. 1978) (“An underlying reason [for not applying the Fourth Amendment exclusionary rule to foreign searches by foreign officials] is the doubtful deterrent effect on foreign police practices that might follow from a punitive exclusion of the evidence by an American court.” (citing *Brulay v. United States*, 383 F.2d 345, 348 (9th Cir. 1967))); cf. *Elkins*, 364 U.S. at 217 (“Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”).

156. See *Elkins*, 364 U.S. at 222.

157. 232 U.S. 383 (1914), *overruled by* *Elkins v. United States*, 364 U.S. 206 (1960), and *Mapp v. Ohio*, 367 U.S. 643 (1961).

and seizure in a federal prosecution.¹⁵⁸ The Court reasoned that “[t]he effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority.”¹⁵⁹ Not only should courts not perpetuate violations of the Fourth Amendment by using the fruits of these unlawful searches, but if the fruits can “be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value, and . . . might as well be stricken from the Constitution.”¹⁶⁰ In short, exclusion is the “only viable remedy available for most Fourth Amendment violations” and without exclusion there is “no real right at all.”¹⁶¹

Courts are clear that their primary reason for excluding evidence seized in an unlawful search is to discourage repeat violations.¹⁶² If law enforcement cannot benefit from its unlawful conduct, then it will take care to play by the rules in the future. In fact, scholars argue that in recent years, “the conservative majority on the Supreme Court has increasingly emphasized deterrence as the *sole* justification for excluding evidence obtained in violation of the Fourth Amendment.”¹⁶³ For example, in *United States v. Leon*,¹⁶⁴ the Court found that, because the police officer acted in good faith, his reliance on a search warrant later determined to be invalid did not require exclusion of the unlawfully seized evidence.¹⁶⁵ A court essentially applies a “balancing test,” weighing the deterrence of the officer’s behavior versus the impediment to “the truth-finding functions of judge and jury.”¹⁶⁶ If the deterrence value is low or nonexistent, a court will lean in favor of preserving the evidence.¹⁶⁷

When courts consider whether to exclude evidence gathered in a foreign jurisdiction they immediately conclude that the “actions of an American court are unlikely to influence the conduct of foreign police.”¹⁶⁸

158. *Id.* at 398.

159. *Id.* at 391–92.

160. *Id.* at 393.

161. Taslitz, *supra* note 14, at 423; *see also supra* text accompanying note 160.

162. *See, e.g.,* Elkins v. United States, 364 U.S. 206, 217 (1960).

163. Cammack, *supra* note 11, at 645 (emphasis added); *see also* JAMES J. TOMKOVICZ, CONSTITUTIONAL EXCLUSION: THE RULES, RIGHTS, AND REMEDIES THAT STRIKE THE BALANCE BETWEEN FREEDOM AND ORDER 20–25 (2011) (discussing generally the exclusionary rule and noting the Supreme Court’s recent shift in justifying the rule solely on the basis of deterrence).

164. 468 U.S. 897 (1984).

165. *Id.* at 926; *accord* Cammack, *supra* note 11, at 646.

166. *See* United States v. Payner, 447 U.S. 727, 734 (1980); United States v. Calandra, 414 U.S. 338, 348 (1974) (noting “[t]he balancing process implicit” in deciding whether to apply the exclusionary rule).

167. *See, e.g.,* Calandra, 414 U.S. at 348 (restricting application of the exclusionary rule to instances where the deterrence purpose is “most efficaciously served” and balancing the benefit of deterrence against the cost of suppressing reliable evidence).

168. United States v. Hensel, 699 F.2d 18, 25 (1st Cir. 1983); *accord, e.g.,* United States v.

The idea is so often repeated that it has become “well established.”¹⁶⁹ It may also explain why courts have so narrowly interpreted the joint venture doctrine when examining evidence collected abroad.¹⁷⁰ If there is no real deterrence, then why find a joint venture that could potentially lead to exclusion? The courts that simply repeat this conclusion without an independent assessment, however, demonstrate a lack of understanding of the evolving relationship between U.S. and foreign law enforcement.

Experience suggests that it is worth a court taking the time to probe the question of whether exclusion could indeed provide meaningful deterrence to law enforcement acting outside the United States.¹⁷¹ As previously detailed, U.S. federal and foreign government actors frequently attack a criminal network from many different fronts. They often combine efforts and take advantage of the severity and certainty of sentencing found in U.S. federal courts. Thus, to the extent that foreign law enforcement agents have an interest in securing a conviction in a U.S. federal court, as opposed to their local courts, these exclusionary rules will deter them. To the extent they do not care and are happy to pursue prosecution (or not) in their local courts, then they are governed by their own standards.

Most importantly, however, application of the exclusionary rule deters U.S. law enforcement from using foreign partners to engage in searches that offend the U.S. Constitution.¹⁷² As noted earlier, the power of the U.S. agent is largely nonexistent outside of the territorial boundaries of the

Cotroni, 527 F.2d 708, 712 (2d Cir. 1975) (“The exclusionary rule is intended to inculcate a respect for the Constitution in the police of our own nation. Since it has little if any deterrent effect upon foreign police, it is seldom used to bar their work product.” (citations omitted)).

169. See *United States v. Janis*, 428 U.S. 433, 455–56 n.31 (1976) (“It is well established, of course, that the exclusionary rule, as a deterrent sanction, is not applicable where a private party or a foreign government commits the offending act.”).

170. As the courts move further away from applying the exclusionary rule to preserve judicial integrity and closer to looking to how it will deter police action, see Robert M. Bloom & David H. Fentin, “A More Majestic Conception”: *The Importance of Judicial Integrity in Preserving the Exclusionary Rule*, 13 U. PA. J. CONST. L. 47, 49 (2010), courts will be unlikely to extend the reach of the Fourth Amendment absent evidence of a deterrent impact on the foreign actors.

171. This question obviously begs another: whether the exclusionary rule meaningfully deters law enforcement violations of the Fourth Amendment for law enforcement acting *within* the United States. Not all scholars agree that it does. See, e.g., Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL’Y 315, 331 (2004) (finding that thirty percent of the searches conducted by police violated the Fourth Amendment); David A. Harris, *How Accountability-Based Policing Can Reinforce—Or Replace—The Fourth Amendment Exclusionary Rule*, 7 OHIO ST. J. CRIM. L. 149, 149 (2009) (“But even if the exclusionary rule remains in place, recently published empirical findings [suggest that] roughly a third of all search and seizure activity violates the Fourth Amendment.”); Taslitz, *supra* note 14, at 419–20.

172. Cf. Street, *supra* note 45, at 459 (arguing that a broader interpretation of the joint venture exception “may . . . deter the United States from collaborating . . . with law enforcement forces known to bend their rules”).

United States.¹⁷³ U.S. law enforcement must depend on partner nations to effectively enforce U.S. laws with extraterritorial application or where evidence must otherwise be found extraterritorially.¹⁷⁴ Furthermore, using traditional methods of securing this evidence can prove incredibly slow and cumbersome.¹⁷⁵ U.S. law enforcement has a far better likelihood of securing the information and evidence they need by building informal partnerships with their foreign law enforcement counterparts. Because U.S. law enforcement will not want to risk the exclusion of evidence, they will be less likely to “tacitly . . . encourage [foreign] officers in the disregard of constitutionally protected freedom[s]” to gain a tactical advantage.¹⁷⁶ And, ideally, by risking exclusion of evidence, U.S. federal law enforcement will be encouraged in the other direction—to take greater care to teach and promote methods of collecting evidence that will withstand scrutiny in U.S. federal courts.

Again, this conclusion is not unrealistic. State–federal experience demonstrates that state law enforcement will, for the benefit of gaining the advantage of a federal prosecution under the federal sentencing guidelines, adhere to the more rigorous standards often found in federal courts. There is no reason to think that foreign police officers would be unwilling to do the same if the outcome was to their benefit. Likewise, foreign law enforcement already shows willingness to learn U.S. investigative methods, including the use of forensics and preserving appropriate chain of custody for evidence, not only for their own investigations, but also to aid in preserving evidence that can be used in a U.S. prosecution.¹⁷⁷ Teaching the principles of probable cause, for example, is part and parcel of the same lesson.

2. Preserving the Integrity of U.S. Courts

Despite the tendencies of a conservative Supreme Court in recent years to emphasize deterrence as the overriding basis for the exclusionary rule, we should not ignore the “imperative of judicial integrity” as a valid rationale for its use.¹⁷⁸ The Fourth Amendment does not just limit the

173. Nadelmann, *supra* note 4, at 74 (“[T]he law enforcement official . . . is rendered largely powerless once he steps beyond his state’s borders.”).

174. *Id.* (“The result is that governments increasingly depend upon one another for the effective enforcement of their laws.”).

175. See Pope, *supra* note 154, at 21 (“Treaties can slow pace of cooperative procedures.”). See generally NADELMANN, *supra* note 63, at 313–96 (international evidence gathering).

176. Cf. *Elkins v. United States*, 364 U.S. 206, 221–22 (1960); see *United States v. Paternina-Vergara*, 749 F.2d 993, 997–98 (2d Cir. 1984).

177. Cf. NADELMANN, *supra* note 63, at 396 (“[W]hat began during the 1970s as a U.S. effort to persuade foreign governments to accommodate the evidentiary needs of its judicial system evolved during the 1980s into a far broader and more ambitious effort to bring foreign laws into greater accordance with U.S. laws.”).

178. For a far more detailed discussion of this topic, see Taslitz, *supra* note 14.

police. It limits all government actors. Thus, courts have just as much responsibility—if not more—to ensure respect for a defendant’s constitutional rights.¹⁷⁹ As the Court acknowledged in *McNabb v. United States*,¹⁸⁰ “[A] conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law.”¹⁸¹ Courts should not be unthinking tools of foreign governments or law enforcement agents that do not share our respect for civil liberties and human rights. Rather, “judges [should] act as a beacon or a symbol to society for ensuring lawful acts by the forces of government.”¹⁸²

But it is not enough for courts simply to admonish overreaching police actors. Without some significant penalty, this protection is only symbolic.¹⁸³ This is particularly true in the context of foreign law enforcement. Because courts have no other power to punish foreign law enforcement for their bad acts,¹⁸⁴ the only place for courts to set limits on the actions of foreign government actors is within the context of the criminal proceeding taking place in their own courtrooms. Therefore, the primary way for courts to promote respect for these constitutional values is

179. See *Rochin v. California*, 342 U.S. 165, 171 (1952) (noting that Article III of the U.S. Constitution safeguards the independence of judges who must interpret “[d]ue process of law” in light of evolving time and thought).

180. 318 U.S. 332 (1943).

181. *Id.* at 345; see also *Weeks v. United States*, 232 U.S. 383, 392 (1914) (“The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.”), *overruled by Elkins*, 364 U.S. 206, and *Mapp v. Ohio*, 367 U.S. 643 (1961).

182. Robert M. Bloom, *Judicial Integrity: A Call for Its Re-Emergence in the Adjudication of Criminal Cases*, 84 J. CRIM. L. & CRIMINOLOGY 462, 464 (1993); see also *Herring v. United States*, 555 U.S. 135, 148–57 (2009) (Ginsburg, J., dissenting) (arguing that the Court should not allow law enforcement officers to circumvent the Fourth Amendment merely because they did not deliberately violate the Fourth Amendment, but only did so negligently); Bloom & Fentin, *supra* note 170, at 72 (“Like the vestals of ancient Rome, judges in the United States are honored for a hallowed duty, which is to administer justice in accordance with the principles of the Constitution.”).

183. See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1684 (1992) (“[A] decision *not* to punish wrongdoers . . . is . . . expressive: it communicates to the victim and to the wider society the idea that such treatment, and the status it attributes the victim, are appropriate . . .” (emphasis added)).

184. For example, the federal criminal civil rights statute, 18 U.S.C. § 242 (2006), is explicitly limited to violations that occur inside the United States. Section 242 reads, in part: “Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person *in any State, Territory, Commonwealth, Possession, or District* to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . .” *Id.* (emphasis added). Because it does not have extraterritorial application, there is no chance that a foreign police officer could be prosecuted for violating a defendant’s civil rights.

to keep law enforcement—domestic and foreign—from profiting from violations.

Finally, exclusion of unreasonably seized foreign evidence is necessary to “minimiz[e] the risk of seriously undermining popular trust in government.”¹⁸⁵ To preserve democratic legitimacy, the actions of the court must be broadly consistent with the rule of law.¹⁸⁶ Fostering a double standard in the treatment of individuals held to account before a court can only weaken the perceived legitimacy of our courts—a high price to pay in the name of law enforcement.

The fact that the courts are not wholly immune to the concept of judicial integrity is evidenced by the willingness of courts to exclude evidence “if the circumstances of the foreign search and seizure are so extreme that they shock the [judicial] conscience, [so that] a federal appellate court in the exercise of its supervisory powers can require exclusion of the evidence.”¹⁸⁷ “This type of exclusion is not based on Fourth Amendment jurisprudence, but rather on the recognition that [courts] may employ [their] supervisory powers when absolutely necessary to preserve the integrity of the criminal justice system.”¹⁸⁸ This fact-intensive inquiry by the courts provides a base level of protection in courts that is not called into question by those who advocate against exclusion.¹⁸⁹ But while an allegation of torture, for example, may provoke an inquiry into the means law enforcement used to obtain evidence, unless conscience-shocking tactics are substantiated, it is by no means a guarantee that the court will exclude the evidence even if the conduct may not have been “reasonable.”¹⁹⁰ Likewise, courts are willing to overlook conscience-

185. *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting); *see also* *Terry v. Ohio*, 392 U.S. 1, 13 (1968) (“A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.”); Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a “Principled Basis” Rather Than an “Empirical Proposition”?*, 16 CREIGHTON L. REV. 565, 604 (1983) (noting that a principal reason supporting the exclusionary rule is that “the Court’s aid should be denied ‘in order to maintain respect for law [and] to preserve the judicial process from contamination’” (alteration in original) (quoting *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967))).

186. *See* Schulhofer et al., *supra* note 153, at 363.

187. *United States v. Barona*, 56 F.3d 1087, 1091 (9th Cir. 1995) (alterations in original) (quoting *United States v. LaChapelle*, 869 F.2d 488, 490 (9th Cir. 1989)) (internal quotation marks omitted).

188. *Id.*

189. *See* *United States v. Maher*, 645 F.2d 780, 783 (9th Cir. 1981) (quoting *Birdsell v. United States*, 346 F.2d 775, 782 n.10 (5th Cir. 1965)); *U.S. ex rel. Lujan v. Gengler*, 510 F.2d 62, 65–66 (2d Cir. 1975) (citing *United States v. Toscanino*, 500 F.2d 267, 275 (2d Cir. 1974)); *United States v. Nagelberg*, 434 F.2d 585, 587 n.1 (2d Cir. 1970) (offering, in dicta, rubbing pepper in a suspect’s eyes as a hypothetical example of shocking conduct).

190. *See* *United States v. Yousef*, 327 F.3d 56, 123–24, 127–28 (2d Cir. 2003) (holding that not excluding a confession was not in error where claims of torture contradicted the record: the

shocking conduct and admit evidence if recovery of the evidence was sufficiently “attenuated” from the misconduct.¹⁹¹

The happy news is that this line of cases suggests that the commitment to preserving judicial integrity is not dead. The less happy news is that courts are willing to tolerate unreasonable law enforcement conduct as long as it does not shock the conscience. But this does not have to be the end of the inquiry. As they did when they reconsidered the admission of evidence unreasonably seized by state law enforcement, courts must now once again “close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right.”¹⁹²

As Justice Brennan noted in his dissent in *Verdugo-Urquidez*:

By respecting the rights of foreign nationals, we encourage other nations to respect the rights of our citizens. Moreover, as our Nation becomes increasingly concerned about the domestic effects of international crime, we cannot forget that the behavior of our law enforcement agents abroad sends a powerful message about the rule of law to individuals everywhere.¹⁹³

The time has come for the United States to hold its own courts, law enforcement, juries, and prosecutors to the same standard—we should not tolerate the use of ill-gotten gains no matter its source.

CONCLUSION

Ultimately, as federal investigators increasingly blur traditional jurisdictional lines to attack powerful transnational criminal networks, they should not do so without regard for the Constitution. While we cannot force foreign actors to behave in ways that comply with our constitutional standards, the decisions of our courts can strongly influence them. Furthermore, the Due Process Clause requires that U.S. courts protect this most basic right—specifically, the right to be free from unwarranted police intrusion. Although imposing a higher standard may initially appear burdensome, in doing so, we are actually promoting a more powerful

defendant denied he had injuries in a medical report on a U.S. plane, the defendant never complained to agents of his injuries, nothing in the record from the foreign government’s custody indicated torture, there was no permanent scarring, and some of the positions alleged by defendant were physically impossible).

191. Courts cite factors that demonstrate attenuation that include a lapse in time, change in circumstance, adequate advisement of rights or a “break in the stream of events” after the coercion. *See, e.g.,* *Holland v. McGinnis*, 963 F.2d 1044, 1050–51 (7th Cir. 1992) (holding that a six-hour lapse, new location, new warnings, and new interrogators constituted a sufficient break in the stream of events to admit evidence in a Fifth Amendment case).

192. *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961).

193. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 285 (1990) (Brennan, J., dissenting).

mechanism to attack transnational criminal actors. In fact, the evidence suggests that those countries with the least respect for civil liberties also have high rates of corruption. The lack of transparency goes both ways and ultimately empowers criminal actors.¹⁹⁴ Thus, highly functioning, transparent civilian institutions around the globe go hand in hand with ending impunity for criminal actors.

The lesson here is that the most effective path forward is one that raises the standards for police conduct without meaningfully undermining law enforcement's ability to hold wrongdoers accountable for their crimes. We should learn from the historical lessons taught by our experience with federal-state partnerships and banish the false distinctions we built between U.S. and foreign law enforcement. "If we seek respect for law and order, we must observe these principles ourselves. Lawlessness breeds lawlessness."¹⁹⁵

194. See Schulhofer et al., *supra* note 186, at 350–51; Taslitz, *supra* note 14, at 470 ("Procedural justice by the police is also likely to be more effective in deterring and successfully investigating crime than is militaristic policing, though harsh policing methods can sometimes promote a grudging and resentful citizen compliance with the law—while lacking the benefit of promoting citizen cooperation with law enforcement.").

195. *Verdugo-Urquidez*, 494 U.S. at 285 (Brennan, J., dissenting).